Supreme Court
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OFFICE OF THE

CASE NO. 93-300

THE SUPREME COURT OF THE UNITED STATES
1993 TERM

SOUTHWEST WATER WELLS, INC., a Florida corporation,

Petitioner,

v.

GARNEY COMPANIES, INC., a Missouri corporation, individually and as joint venturer doing business as WAUGH/GARNEY JOINT VENTURE a joint venture, and AMERICAN HOME ASSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

WHETHER A FEDERAL DISTRICT COURT SITTING IN DIVERSITY VIOLATES THE DOCTRINE ESTABLISHED BY ERIE R. v. TOMPKINS, 304 U.S. 64 (1938), IN DISMISSING A FLORIDA RESIDENT'S LAWSUIT, SOLELY ON GROUNDS OF THE FEDERAL COMMON LAW OF FORUM NON CONVENIENS, WHERE FLORIDA'S STATE COMMON LAW OF FORUM NON CONVENIENS, AS WELL AS FLORIDA'S STATE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS, FORBIDS DISMISSAL OF THAT SAME ACTION.

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II. CORPORATE DISCLOSURE STATEMENT.
Sup. Ct. R. 14.1(b), 29.1.

No parent or subsidiary company is to be listed under Supreme Court Rule 29.

III. GROUNDS INVOKING JURISDICTION.
Sup. Ct. R. 14.1(e).

Petitioner seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit dated March 10, 1993. See infra p.9. The court of appeals denied rehearing of its judgment on May 20, 1993. See infra p. 10.

Petitioner believes that 28 U.S.C. § 1254 (1993 Supp.) confers jurisdiction upon this Court.

IV. CONSTITUTIONAL PROVISION INVOLVED.
Sup. Ct. R. 14.1(f).

Fla. Const. art. I, § 21 (1968): "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

V. STATEMENT OF CASE.
Sup. Ct. R. 14.1(g).

A. Factual Background.

In 1990, petitioner, Southwest Water Wells, Inc. ("Southwest"), a Florida resident and corporation, contracted with the Waugh/Garney Joint Venture ("Waugh/Garney"), to

drill wells in the Commonwealth of the Bahamas. Waugh/Garney was a joint venture between Garney Companies, Inc. ("Garney"), a Missouri corporation, and Waugh Construction, Ltd. ("Waugh"), a Bahamian corporation. Following Southwest's performance, a payment dispute arose between Southwest and Waugh/Garney.

B. Procedural Background.

On July 3, 1991, Southwest filed suit against Garney, Waugh/Garney, and the payment surety on the project, American Home Assurance Company, in Florida state court for breach of contract and enforcement of a suretyship agreement. Defendants removed the case to the United States District Court for the Middle District of Florida on the basis of diversity of citizenship of the parties[1] and, once in federal court, moved for dismissal based upon the federal common law of forum non conveniens. On May 28, 1992, the district court granted Defendants' motion and dismissed Southwest's lawsuit. Southwest timely appealed the district court's judgment and, on March 10, 1993, the Eleventh Circuit Court of Appeals entered judgment affirming the district court.

VI. ARGUMENT FOR ALLOWANCE OF WRIT. Sup. Ct. R. 14.1(j).

A. Circuit decisions conflict.

In Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), an opinion written by Judge Learned Hand, the Second Circuit required observance of the state, rather than federal, common law rule essentially identical to forum non conveniens.

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[1] 28 U.S.C. § 1332 (1993 Supp.).

However, Sibaja v. Dow Chemical, 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985), and In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987), require observance of the federal common law rule. Thus, this Court's jurisdiction is necessary to bring uniformity to the Erie doctrine.

B. Eleventh Circuit decision conflicts with Supreme Court's Hanna decision.

Sibaja follows the federal common law of forum non conveniens and thereby violates this Court's directives because the federal rule (1) encourages forum shopping by promoting removal, and (2) promotes the inequitable administration of laws by allowing dismissal of an action which, but for diversity of citizenship between the litigants, would proceed to judgment in Florida's courts. See Hanna v. Plumer, 380 U.S. 460 (1965). Further, the Sibaja analysis is expressly based upon forbidden "talismanic" and "common sense" interpretations of the words "substantive" and "procedural," in violation of this Court's express prohibitions of such analyses. See Hanna v. Plumer, 380 U.S. 460, 465, 466; see also Guaranty Trust v. York, 326 U.S. 99 (1945). Thus, this Court's jurisdiction is warranted in order to enforce conformity with this Court's clear mandates.

C. This question is a matter of exceptional importance.

1. The instant question represents unfinished business of Piper.

This Court, in Piper Aircraft v. Reyno, 454 U.S. 235 (1981), clarified the federal common law of forum non conveniens without answering the more fundamental question of whether the federal or state common law should apply in the first instance. In Piper, this Court stated:

> The Court did not decide [the issue of whether, under Erie, state or federal law of forum non conveniens applies in a diversity case] because the same result would have been reached in each case under federal or state law.

Id. at 249 n. 13.

However, Florida's common law of forum non conveniens, unlike that of the forum state in Piper, prohibits dismissal where, as in the instant case, a party to the action is a Florida resident. Houston v. Caldwell, 359 So.2d 858 (Fla. 1978); Sibaja v. Dow Chemical, 757 F.2d 1215. Thus, the crucial question of whether a district court sitting in diversity must follow the state or federal common law of forum non conveniens is ripe for review, and this Court's jurisdiction is warranted to finish Piper's exceptionally important task of bringing certainty to the law of forum non conveniens, and uniformity to the Erie doctrine.

2. Challenged rule is extreme and arbitrary.

The instant question is also exceptionally important because it challenges a rule which permits denial of the state constitutional right of a Florida resident to seek redress of injury in a Florida forum, or at least an American court, and does so on the purely fortuitous and arbitrary grounds of diversity of citizenship among parties.

VII. CONCLUSION.

For the foregoing reasons, Southwest prays this Court grant jurisdiction to resolve the question here presented.

MARK R. KOMRAY, Attorney of Record
for Southwest Water Wells, Inc.

TOM SMOOT, III

VIII. APPENDIX. Sup. Ct. R. 14.1(k).

A. Order delivered upon rendering judgment by the Eleventh Circuit Court of Appeals, whose decision is sought to be reviewed (March 10, 1993). Sup. Ct. R. 14.1(k)(i).

In the United States Court of Appeals for the Eleventh Circuit;
No. 92-2639
D.C. Docket No. 91-1381-CIV-T-21C

Southwest Water Wells, Inc., a Florida Corporation, Plaintiff-Appellant,	)
versus	)
Garney Companies, Inc., a Missouri corporation, individually, d/b/a Waugh/Garney Joint Venture; American Home Assurance Company, Defendants-Appellees.	)

Appeal from the United States District Court for the Middle District of Florida

March 10, 1993

Before ANDERSON and EDMONDSON, Circuit Judges and YOUNG*[Honorable George C. Young, Senior United States District Judge for the Middle District of Florida, sitting by designation.]

PER CURIAM: AFFIRMED. See Eleventh Circuit Rule 36-1.

B. Any other opinions, orders, findings of fact, and conclusions of law. Sup. Ct. R. 14.1(k)(ii).

1. "On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc" (May 20, 1993).

In the United States Court of Appeals for the Eleventh Circuit

No. 92-2639

D.C. Docket No. 91-1381-CIV-T-21C

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On Appeal from the United States District Court for the Middle District of Florida

On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc

Before ANDERSON and EDMONDSON, Circuit Judges and YOUNG* [Honorable George C. Young, Senior United States District Judge for the Middle District of Florida, sitting by designation.]

PER CURIAM: The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: /s/ UNITED STATES CIRCUIT JUDGE.

May 20, 1993.

2. "ORDER" (April 28, 1992).

United States District Court Middle District of Florida
Tampa Division

Case No. 91-1381-CIV-T-21(C)

Southwest Water Wells, Inc.,
a Florida corporation, Plaintiff,

v.

Garney Companies, Inc.,
a Missouri corporation,
individually and as joint venturer
doing business as Waugh/Garney
Joint Venture a join venture,
and American Home Assurance
Company, Defendants.

ORDER

Before the Court for consideration is the Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens, and, or in the Alternative, to Dismiss Pursuant to Rule 12(b)(7) for Failure to Join Indispensable Parties Under Rule 19 (Dkt. #17). The Court has reviewed the Defendants' memoranda and the Plaintiff's memoranda in opposition thereto, and is of the view that this action should be dismissed based on forum non conveniens.

FACTS

The Plaintiff's suit arises out of a construction subcontract to drill disposal wells in the Bahamas on behalf of the government of the Bahamas Water and Sewage Corporation ("Owner"). The Owner contracted with Waugh/Garney Joint Venture ("Waugh/Garney" or "joint venture"), a venture organized solely for the purpose of undertaking the project. Waugh is a corporation organized under the laws of the Commonwealth of the Bahamas, and Garney is a Missouri corporation. After entering into the contract with the Owner, Waugh/Garney subcontracted with the Plaintiff to perform the well drilling, well testing, and geophysical logging work as called for in the contract with the Owner. The contract and the related plans, specifications and other contract documents were incorporated by reference into the subcontract between Waugh/Garney and the Plaintiff.

In September, 1991, the Plaintiff filed a three count complaint against the Defendants in state court, alleging that it had not been paid on a timely basis for work performed and materials provided in connection with the project, and that it was entitled to additional payments for extra work and change and cancellation orders. In addition to the breach of contract count, the Plaintiff also alleged that the surety was obligated under the payment bond to pay for the work described in the contract. The Defendants timely removed the case to this Court and filed an answer and the Motion which is the subject of this Order.

FORUM NON CONVENIENS

The use of forum non conveniens "represents a reasoned attempt to apply ancient principles of the common law to the complicated international choice of law questions increasingly presented to district courts. It provides a workable

intellectual tool with which courts can attack these vexing jurisdictional questions, separating out for hearing only those cases where contacts with the American forum predominate." Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1519 n.10 (11th Cir. 1985). "Forum non conveniens dismissals are desirable because they obviate the need to engage in 'complex exercises in comparative law.'" Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981)). The Eleventh Circuit has stated that the use of the doctrine is to be favored. Sigalas at 1519 n.10.

In determining whether to decline to exercise jurisdiction under the doctrine of forum non conveniens, a district court must weigh the relative advantages and disadvantages of a trial in each forum, and consider public and private interest factors. C.A. La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983).

> As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. If the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that the plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

Id. (emphasis in original) (citing Pain v. United Technologies

Corp., 637 F.2d 775, 784-85 (D.C.Cir. 1980) cert. denied, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981)).

In considering the private interests of the parties, the trial court can factor the relative ease of access to the sources of proof; the ability to obtain witnesses; if relevant, the possibility of viewing the premises; and other considerations that make a trial easy, expeditious and inexpensive. Id. Public interests to be factored by the trial court include court congestion and the utilization of jurors to hear cases that are unrelated to the forum; the desirability of having local controversies heard locally; and the difficulties of resolving conflict of laws issues and applying foreign law. Id. The trial court should not give substantial weight to the consideration of whether the remedy in the alternative forum is less generous, unless the other nation's remedy is so inadequate that it is no remedy at all. Sigalas, 776 F.2d at 1519 (11th cir. 1985).

The list of considerations is not exhaustive or dispositive. The Court must balance each factor without placing controlling emphasis upon any one consideration, since flexibility is the essence of the doctrine of forum non conveniens. Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249, 102 S.Ct. 252, 262, 70 L.Ed.2d 419 (1981)).

ANALYSIS

Adequate Alternative Forum and Private Interest

In the case at bar, the Commonwealth of the Bahamas provides an adequate alternative forum which possesses jurisdiction over this matter. In fact, there are pending lawsuits in the courts in the Bahamas where all parties involved in this controversy are present.

[n.1. At the hearing of this Motion, the Plaintiff asserted that they are defendants in the pending lawsuits, and that it is more desirable to litigate this case as a plaintiff. This consideration alone, without more, is insufficient to avoid dismissal based on forum non conveniens.]

Since the construction project occurred in the Bahamas, many of the witnesses and documents are located there. Further, since the Plaintiff has already been named in a lawsuit in the Bahamas involving the same set of facts and issues that are present in the case at bar, its assertions that it would be easier to litigate the case in this forum are without merit. The Plaintiff's initial forum choice is also a factor which must be considered. However, the Plaintiff chose to initiate their cause of action in state court, and removal by the Defendants brought them to federal court. Therefore, in balancing the strong presumption against disturbing the Plaintiff's initial forum choice with other factors of private interest, the Court is of the view that this balance is near equipoise.

Public Interest

The public interest considerations point to the Bahamas as a more appropriate forum to determine the outcome of this action. The controversy arose out of a construction project in the Bahamas, and the outcome of this litigation will have a more direct impact on the residents in that forum than on the residents in this forum. While the Plaintiff is a Florida corporation, all of the other parties to this action are foreign to this jurisdiction. Thus, the desirability of having localized controversies decided at home is not a controlling factor. If this case was to be heard in this jurisdiction, this Court would face the arduous task of resolving conflict of law questions as well as applying foreign law.

In the hearing on this matter, the Defendants strenuously asserted that the risk of inconsistent verdicts was great since there are pending lawsuits in the Bahamian court involving the same parties and issues. The Court has considered that fact in weighing the private and public interests of dismissing the case based on forum non conveniens grounds. Accordingly, it is

ORDERED AND ADJUDGED that the Defendants' Motion is GRANTED and this case is DISMISSED.

DONE and ORDERED at Tampa, Florida this 28th day of April, 1992.

/s/Ralph W. Nimmons, Jr.
United States District Judge.